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## THE MORALS OF MONOPOLY AND COMPETITION.

HOMER BLOSSER REED.

THE changing character of morals is nowhere more conspicuous than in those of monopoly and competition. We are about to put men in jail for selling their own goods at their own prices or for selling cheaper to one man than to another. Less than a half century ago such acts of competition were considered the life of trade and a boon to the public welfare. All this is now changed and the question now comes up what can possibly be the moral and logical grounds on which such things are justified.

Underlying the changing character of morals is the conception that new conditions require new rules. It usually happens that when the conditions suddenly change old rules are applied unaltered, and are allowed to work serious havoc before their inertia is overcome and an effort made to formulate rules fitting the new situation. This state of affairs applies in particular to the morals of competition and monopoly. Within the last half century there has been an unrivaled development of industry from a simple agricultural stage to the extreme form of the factory system, or from industry as carried on by individuals each according to his preference to a condition of industry carried on by the combined efforts of many men bringing about large combinations and monopolies. But there has been no corresponding change in business methods or morals. On the contrary, competitive morals have been applied without alteration to conditions of monopoly and combination. This misapplication resulting from the unequal evolution between business morals and business conditions appears to be the fundamental cause of our present monopolies and other industrial problems engaging the serious efforts of our legislatures and courts.

The best sources on the morals of trade with reference to the rise of competition and to the changes from competitive to monopolistic conditions or from small scale production to large scale production are the court decisions within the last century and a half. They have the advantage of representing *de facto* laws and customs as well as reflecting the morals of the conservative and enlightened public.

The opinion is often expressed that the so-called laws of competition have existed since time out of mind, are a part of the order of nature, and as such are unchangeable. There are a few old cases, however, which indicate that such a view is contrary to fact, and that the competitive system grew out of previous monopolistic conditions fostered by the mediæval guild system and by royal grants. It was welcomed because it was thought a vast improvement upon the old system and in the interest of the public. Beale and Wyman, writing of the governmental regulation of business during the late middle ages say: "Not only did the law regulate business indirectly through the courts, parliament itself frequently regulated prices of the necessities of life by direct legislation. The great staples like wool and food were habitually regulated in this way, and the employment and price of labor was a subject of statutory provision. Thus, in 1366, Henry III, after reciting former statutes to the same effect, regulated the price of bread and ale according to the price of wheat and barley, and forbade forestalling, that is, cornering the market. In 1344 the ordinances fixing the export prices of wool were repealed after some years of trial. In 1349 all laborers were obliged to serve for the customary wages; and 'butchers, fishmongers, regrators, hostelors (*i.e.*, inn-keepers), brewers, bakers, poulterers, and all other sellers of all manner of victuals' were bound to sell for a reasonable price.<sup>1</sup> These statutes continued in force throughout the middle ages, and until the settlement of America."<sup>1</sup> The explanation of this régime is to be found in the economic

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<sup>1</sup> *Railroad Rates Regulation*, p. 7.

conditions of the times. The respective business men had a practical monopoly in their own localities. To prevent extortion or refusal of service, either of which might be very damaging to a customer, the state had to undertake regulation. So far as a single case is evidence, a breaking away from these conditions began with the Schoolmaster's case in 1410.<sup>2</sup> The masters of a grammar school in Gloucester brought a complaint against another master, and said that the defendant had started a school in the same town, so that whereas formerly they had received 40*d.* a quarter from each child, they now got only 12*d.* to their damages. Their counsel contended that this interference and damage made a good action, and cited many instances of exclusive rights, especially the claim of the masters of Paul's that there should be no other masters in all London except themselves. But Justice Hill denied the claim of the plaintiffs since they had no estate but a ministry for the time; and though another equally competent with the plaintiffs came to teach the children, "this was a virtuous and charitable thing, and an ease to the people, for which he could not be punished by the law."

It would be difficult to find a better illustration of the fact that competition was welcomed because it was an "ease to the people." But without going into further detail upon the origin of the system of free competition, it may be said that in course of time there developed a fixed set of morals, customs, and habits which became crystallized into the common law and which represent what seems almost the apex of individual liberty. To give an idea of the wide range of liberties allowed in competition by the American common law we may refer to the recent case of *Citizens' Light, Heat, and Power Co. v. Montgomery Light and Power Company*. The contestants were competitors in furnishing light, heat, and power to the people of Montgomery. The defendants induced customers of plaintiff to break their contracts with it, made

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<sup>2</sup>Y. B. 11, Henry IV, 47, 21. Wyman, *Cases on Restraint of Trade*, I.

false statements about its credit and service, and frequently took business below cost in order to take its trade away. The court gave judgment for the plaintiff on the first count but for the defendants on the other two, Judge Jones saying:

At common law, a trader, or persons in other callings, in order to get another man's customers, could use any means not involving violation of the criminal laws, or amounting to "fraud," "duress," or "intimidation," as the law understands and applies these terms to transactions between man and man, or to his becoming a wrongful party to a breach of another man's contract. The trader may boast untruthfully of the merits of his wares, so long as it does not take the form of false statements, amounting to slander or wilful misrepresentation of the quality of a rival's product, or a libel upon the character, business standing, and credit of his rival, or an effort to induce the public to believe that the product he sells is that manufactured and sold by the rival. He may send out circulars, or give information verbally, to customers of other men, knowing they are bound by a contract for a definite term, although acting with the purpose of getting the trade of such a customer. He may use any mode of persuasion with such a customer, keeping within the limitations stated, which appeal to his self-interest, reason, or even his prejudices. He may descant upon the extent of his rival's facilities compared with his own, his rival's means, his insolvency, if it be a fact, and the benefits which will result to the customer in the future from coming to the solicitor rather than remaining where he is. He may lawfully, at least so far as his rival is concerned, cut prices to any extent, to secure his trade. So long as what he does is done to the benefit of his own trade and, in taking over the customers of another, he keeps within the limits heretofore defined, he is safe from legal restraint at the instance of a competitor in following "the law of competition," which takes little note of the ordinary rules of good neighborhood, or abstract morality. The person whose customers are thus taken from him cannot complain, for no right of action lies in his favor against him who solicited his customer, since the solicitor exercised a legal right in a legal way.<sup>3</sup>

The judge giving this opinion has lost sight of the public interest in the competitive system which was originally designed for its benefit. He takes no account of common morality. He simply states what the common law allows and gives his decision accordingly, which is clearly a crystallization of the *laissez faire* policy in business.

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<sup>3</sup> 171 Fed. 553.

The liberties which he allows function well in such a competitive system as that in which they developed. The traders were small, had approximately equal resources, and each one was more or less for himself. If one trader cut prices, or gave rebates, or granted special favors to particular customers, or slandered his rival, or untruthfully boasted of the merit of his wares, his competitor could do likewise with equal effect. If a customer could not get satisfactory terms from one trader, he could do so from another. The public took no interest in this war of competition except to get the advantage of good bargains. If any one was injured it was the trader rather than the consumer. There were of course evils such as numerous bankruptcies and periods of under- and of over-production, but on the whole the system was worth more to the public than it cost, and one positive merit it did have was that it allowed full freedom to individual capacity and ingenuity.

But if we introduce into this competitive system of approximately equal individual traders a large combination of individual traders having an enormous capital, then the competitive morals as practiced between the combination and the individual trader have an altogether different effect because of the inequality of capital. In a siege of price-cutting, in getting information of the competitor's business from their employees and from those of the railroads, in securing favorable advertising in the form of disinterested news and editorials, in delaying litigation by appeals, and in many other instances the combination can get advantages which are wholly denied to the small trader because of his small capital. The small trader may be a better manager than any one in the combination; he may produce cheaper, treat his customers more considerately, give prompter service, and offer a superior quality of goods; but no matter what his merits are, he cannot possibly overcome the superior capital of the combination which as a consequence secures a monopoly. It then has power to oppress the public

with unreasonable prices through which it may recoup its losses from the war of competition.

When such a result occurs, we begin to hear of "unfair competition," "cut-throat and predatory competition," "tainted money," "anti-trust legislation," "the extortion of monopolies," "restraint of trade," "reasonable and unreasonable restraint of trade," and similar phrases which indicate that the problem has arisen in the public consciousness and that moral feelings have been aroused. The old adage, "Competition is the life of trade," begins to have an unsavory sound and these so-called laws of competition which have existed since time out of mind begin to be questioned. The combination is dubbed an "Octopus." But as a matter of fact the combination has done nothing more than carry out the "good, old-fashioned laws of competition," the very same methods practiced daily by those who raise the bitter cry against it. The only difference is that the combination profits, and the little trader goes to the wall. The question arises, however, whether a combination can rightfully adopt the same methods practiced by small traders in competition and whether its large capital does not create a new situation in which the old morals of competition fail to function, and whether the combination should not adopt a new set of morals commensurate with its new situation. Here there is clearly a moral problem, and to show the form which it has taken we can do no better than to refer to some court decisions on the matter. It is probable that conservatives will think the old system of competition good enough while those enlightened on new conditions will recommend a change. I shall quote first some opinions from the former class. We shall find that they are averse to making distinctions between kinds of competition, and believe competition as such a part of the unchangeable order of nature.

The Mogul Steamship case, the leading case on competition in England, gives the general trend of the conservative views. In this case, the defendants, who were

firms of ship owners trading between China and Europe, formed themselves into an association, from which the plaintiffs were excluded, the purpose being to obtain a monopoly of the tea trade and maintain freight rates. They offered a rebate of five per cent to shippers who consigned their tea exclusively to their (the defendants') vessels, and also undertook to send special ships to underbid any vessels which plaintiffs might send. Defendants reduced rates so low that plaintiffs were obliged to carry at a loss in order to obtain homeward cargoes. To recover their losses they brought suit for damages. Lord Morris in his judgment said: "I am not aware of any stage of competition called 'fair' intermediate between lawful and unlawful." The Lord Chief Justice Coleridge said:

It must be remembered that all trade is and must be in a sense selfish; trade not being infinite, nay the trade of a particular place or district being possibly very limited, what one man gains another loses. In the hand-to-hand war of commerce . . . men fight on without much thought of others, except a desire to excel or defeat them. Very lofty minds, like Sir Philip Sidney with his cup of water, will not stoop to take an advantage, if they think another wants it more. Our age, in spite of high authority to the contrary, is not without its Sir Philip Sidneys; but these are counsels of perfection which it would be silly indeed to make the measure of the rough business of the world as pursued by ordinary men of business.<sup>4</sup>

Lord Justice Fry said:

I know no limits to the right of competition in the defendants—I mean, no limits in law. I am not speaking of morals and good manners. To draw the line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the courts. Competition exists when two or more persons seek to possess or enjoy the same thing: it follows that the success of one must be the failure of another—and no principle of law enables us to interfere with or to moderate that success or that failure so long as it is due to mere competition.<sup>5</sup>

Lord Justice Bowen gave the clearest exposition of the common law on this subject. He said in part:

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<sup>4</sup> 21 L.R.Q.B.D. 553-4.

<sup>5</sup> 23 L.R.Q.B.D. 625-26.



We are presented in this case with an apparent conflict or antinomy between two rights that are equally regarded by the law—the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others. . . . What, then, are the limitations which the law imposes upon a trader in the conduct of his business as between himself and other traders? . . . No man, whether trader or not, can . . . justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by shew of violence; the obstruction of actors on the stage by preconcerted hissing; the disturbance of wild fowl in decoys by firing guns; the impeding or threatening servants or workmen; the inducing persons under personal contracts to break contracts; all are instances of such forbidden acts. But the defendants have been guilty of none of these acts. They have done nothing more against plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade. . . . To say that a man is to trade freely but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection. But we are told that competition ceases to be a lawful exercise of trade . . . if carried to a length which is not fair or reasonable. The offering of reduced rates . . . is said to have been “unfair.” This seems to assume that, apart from fraud, intimidation, molestation, or obstruction of some other personal right, there is some natural standard of “fairness” or “reasonableness” (to be determined by the internal consciousness of judges and juries) beyond which competition ought not in law to go. There seems to be no authority . . . for such a proposition. It would impose a fetter upon trade. . . . And what is to be the definition of a “fair profit”? It is said that it ought to be a normal rate of freight, such as is reasonably remunerative to the shipowner. But over what period of time is the average of this reasonable remunerativeness to be calculated? All commercial men are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the argument at bar, it might be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary “normal” standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs, “Thus far shalt thou go and no further.” To attempt to limit English competition in this way would probably be as hopeless an endeavour as the experiment of King Canute. . . . Assume that what is done is intentional, and that it

is calculated to do harm to others. Then comes the question, Was it done with or without just "cause or excuse"? . . . legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own rights. . . . But if the real object were to enjoy what was one's own, or to acquire for one's self some advantage in one's property or trade, and what was done was done honestly, peaceably, and without any of the illegal acts above referred to, it could not in my opinion, properly be said to be done without just cause or excuse.<sup>6</sup>

Along the same line as this opinion have been numerous American decisions. The following indicate the lower limits to which competition may go in America.

In *Bohn Mfg. Co. v. Hollis*, a number of retail dealers in lumber combined for the purpose of preventing wholesale dealers from selling directly to consumers or other non-dealers in localities where a member of the association did retail business. Judge Mitchell upheld the association, saying:

What one man may lawfully do singly, two or more may lawfully do jointly. The number who unite to do the act cannot change its character from lawful to unlawful. The gist of private action for the wrongful act is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. . . . It can never be a crime to combine to commit a lawful act, but it may be a crime for several to combine to commit an unlawful act, which, if done by one individual alone, although unlawful, would not be criminal.<sup>7</sup>

In *Macauley Brothers v. Tierney*, the members of a national association of plumbers agreed not to buy from wholesale dealers who sold to plumbers not members. Chief Justice Matteson justified the action, saying: "Competition, it has been said, is the life of trade. . . . To hold such action wrongful and illegal would be to stifle competition."<sup>8</sup>

In *National Protective Association v. Cumming*, where contestants were competing organizations of steam-fitters,

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<sup>6</sup> 23 L.R.Q.B.D. 614-16, 618-19.

<sup>7</sup> 54 Minn. 223, 234.

<sup>8</sup> 19 R.I. 255.

defendants caused the discharge of plaintiffs by the threat of a strike. Chief Justice Parker justified the conduct of defendants mainly on the grounds of competition, that an organization may lawfully do what an individual may lawfully do. The following extract indicates the ground of his decision:

A man has a right, under the law, to start a store and to sell at such reduced prices that he is able in a short time to drive the other store-keepers in his vicinity out of business, when, having possession of the trade, he finds himself soon able to recover the loss sustained while ruining the others. Such has been the law for centuries. The reason, of course, is that the doctrine has generally been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of damages is privileged.<sup>9</sup>

An unusually vigorous defense of competition is found in a Standard Oil case decided in West Virginia. Defendant, the Standard Oil Company, built a pipe line through the territory of the plaintiff's line, and then refused to buy oil from producers unless they shipped it through the Standard's line, and also refused to buy any oil shipped through plaintiff's line. This ruined the business of the plaintiff. Judge Brannon held such conduct not actionable. He said:

[This] is the act of persons and corporations, by union of means and effort, drawing to themselves, in the field of competition, the lion's share of the trade. This is not monopoly condemned by law. The lion has stretched out his paws and grabbed in prey more than others, but that is the natural right of the lion in the field of pursuit and capture. Pity that the lion exists, his competing animals may say; but natural law accords the right, it is given him by the Maker for existence. The state made the Standard Oil Company, and gave it this right of being and working. . . . The defendant companies were all in common interest. Could they not unite to further their interests? Could not the Standard Oil Company buy from whom it chose? . . . Cannot the village merchant say to the farmer, "I will not buy your eggs unless you buy my calico"? Cannot the big mill owner refuse to buy wheat from those who do not ship it over a railroad or steamboat owned by him? . . . Now, these companies were furthering their interests in lawful competition with others. . . . That, in these days of sharp ruinous competition,

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<sup>9</sup> 171 N. Y. 315.

some perish is inevitable. The dead are found strewn all along the highways of business and commerce. Has it not always been so? Will it not always be so? The evolution of the future must answer. What its evolution will be in this regard we do not yet know, but we do know that thus far the law of the survival of the fittest has been inexorable. Human intellect—human laws—cannot prevent these disasters. The dead and wounded have no right of action from the working of this imperious law. This is a free country. Liberty must exist. It is for all. This is a land of equality, so far as the law goes, though some men do in lust of gain get advantage. Who can help it? <sup>10</sup>

From these cases, it is possible to form an idea, not only of the particular acts allowable in competition, but also of the general principles on which they are permitted. The former have been sufficiently reviewed. The latter seem to fall into three classes. Competition is morally right because: (1) it is the right of individual freedom, and what individuals may do singly they may do jointly; (2) it is based upon natural right and the law of the survival of the fittest, an order of nature created by the Maker; (3) it is for the best interests of society, being worth more than it costs. These principles are but reflections of a competitive industrial society which has been defended ever since Adam Smith's "Wealth of Nations." But within the last fifty years there has been a rapid change in the industrial order; a change from individual, competitive, and small-scale production to co-operative, monopolistic, and large-scale production; a movement from an undirected, unorganized, and separate control of the many to the directed, organized, and unified control of the few. The judiciary has begun to appreciate the significance and tendency of this movement. Accordingly, we have a number of cases in which the judges have ceased justifying acts of trade simply because they are due to mere competition and applying old rules to new conditions and have carefully considered whether a given act is for the best interests of society, whether it tends toward monopoly, or is only in reasonable restraint of trade.

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<sup>10</sup> 50 W. Va. 611, 617-21.

Without going into details, it may be said in a general way that the principles upon which this new line of decisions is based began to be laid down in the English case of *Mitchel v. Reynolds* in 1712. The defendant leased his bake-shop in the parish of St. Andrew's Holborn, to plaintiff for a period of five years, and upon a bond of fifty pounds, agreed not to open a new shop within this time. But he broke his agreement and was sued. Parker, C. J., said that since the contract was limited to a particular place and offered a fair consideration to the plaintiff it should be maintained. But a contract restraining trade generally throughout the kingdom is void, "being no benefit to either party and only oppressive." "The true reasons of the distinction upon which the judgments in these cases of voluntary restraint of trade are founded are: the mischiefs which may arise from them, first, to the party, by the case of his livelihood and the subsistence of his family; secondly, to the public by depriving it of a useful member."

The principles of distinction between reasonable and unreasonable restraints of trade are more clearly stated in *Horner v. Graves*, 1831. The contestants were dentists. Defendant, who was a moderately skillful dentist, agreed not to practice independently within a radius of 100 miles from York, in consideration of entering the service of plaintiff for five years at a salary of 100 pounds per year, to be increased annually; but within three months he started independently within the prohibited distance. Counsel for defendant argued:

If the Plaintiff were to labor night as well as day, it would be physically impossible for him to draw all the teeth of such a district. If he leaves home, York is without the benefit of his skill; if he remains at York, patients may die at Lancaster . . . the health of the public is endangered, without the possibility of any advantage to the Plaintiff. The agreement is therefore unreasonable and void.

Tyndall, C. J., agreed with counsel, and out of these petty facts developed a most significant principle for distinguishing between reasonable and unreasonable re-

straint of trade, a principle which has been frequently affirmed in American decisions upon questions of monopoly. He said:

And we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection of the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than necessary for the protection of the party, can be of no benefit to either. It can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy.<sup>11</sup>

In these two cases we have laid down the fundamental principles for the determination of monopoly and restraint of trade, a half century before the problem existed in its modern form. The public interest should be the controlling factor in determining the reasonableness of a contract in restraint of trade. Monopoly or total restraint of trade is against the public interest and is unlawful. But a partial restraint of trade, if it allows a fair consideration for the contracting parties and no more than is necessary for their protection, is reasonable and good. If it produces a greater protection than necessary, it is oppressive and void. It remains only to define more specifically what constitutes monopoly and public interest, and by what principle we may determine what a fair protection is for the contracting parties.

The definition of monopoly and public interest is rather concretely stated in *Morris Run Coal Company v. Barclay Coal Company*, decided by the Supreme Court of Pennsylvania in 1871. Five coal companies organized a selling agency which had control of the production of the respective companies and could fix prices. Judge Agnew said:

When competition is left free, individual error or folly will generally find a correction in the conduct of others. But here . . . they have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi rivers. . . . The public

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<sup>11</sup> Bing, 733, 743.

interest must succumb to it for it has left no competition to correct its baleful influence. . . . The domestic hearth, the furnaces of the iron master, the fires of the manufacturer, all feel its restraint. . . . Such a combination is more than a contract it is an offense. . . . Every "corner," in the language of the day, whether it be to affect the price of articles of commerce such as breadstuffs, or the price of vendible stocks, when accompanied by a confederation to raise or depress the price and operate on the market, is a conspiracy.

In another coal case, *Pocahontas Coke Co. v. C. & C. Co.*, where twenty coal operators combined in a form similar to that in the case above, monopoly is still more clearly defined. Judge Cox said:

If the direct and necessary and natural effect of a contract or combination among producers and sellers of a commodity is to restrain competition and control prices to the injury of the public when all the powers of the contract or combination shall have been exercised, the contract or combination is in unreasonable restraint of trade and against public policy. . . . A contract which is charged to be in restraint of trade is not to be tested by what *has been* done under it but by what *may* be done under it.<sup>12</sup>

The definition is now clear. The test of a monopoly or contract in restraint of trade against the public interest is power or tendency to control prices.

Another leading case referred to in numerous recent decisions against monopolistic practices was laid down in Massachusetts by Chief Justice Shaw in *Commonwealth v. Alger*, 1851. The question was whether an owner of land along the seashore might extend a wharf beyond a limit prescribed by the legislature, if it neither obstructs navigation nor is a public nuisance. Justice Shaw did not permit the exception since this would confuse the law, and the law he upheld on this ground:

We think it a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All

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<sup>12</sup> 60 W. Va. 508, 524-5.

property in this commonwealth . . . is derived directly or indirectly from the government, and held subject to the common good and general welfare. Rights of property, like other social and conventional rights, are subject . . . to such reasonable restraints and regulated by law . . . as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. . . . The power we allude to is . . . the police power, the power vested in the legislature by the constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.<sup>13</sup>

The good of the subject of the state or the public interest also formed the basis of a dissenting opinion by Lord Esher in the *Mogul Steamship* case already referred to. He said:

Unless the public has an interest in traders being left to their own judgment, and to a free course of trade, there is no foundation for the law as to agreements in restraint of trade being illegal. . . . It follows if the agreement be an agreement to violate the right of an independent trader by restraining his trade, there is a sufficient public interest which is also injured, and the agreement is an indictable conspiracy. . . . If one goes beyond the exercise of the course of trade . . . his act is an unlawful obstruction. . . . The act of the defendants lowering their freights far beyond the lowering for the purpose of any trade—that is to say, so low that if they continued it, they themselves could not carry on the trade—was not an act done in the exercise of their own free right of trade, but was an act done evidently for the purpose of interfering with . . . the plaintiff's right to a free course of trade, and was a wrongful act.<sup>14</sup>

The principle that property rights proceed from the state and must be used for the common good of its subjects has received a new interpretation in a recent Massachusetts case, *Martell v. White*, which has special bearing upon competition. The question was whether a voluntary association of granite-workers could, by a system of fines, prevent members from trading with plaintiff who was not a member, and so ruin his business of quarrying granite. The court denied the right, Judge Hammond saying:

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<sup>13</sup> 61 Mass. 53, 84, 85.

<sup>14</sup> 23 L.R.Q.B.D. 606-10.



To what extent combination may be allowed in competition is a matter about which there is as yet much conflict, but it is possible that, in a more advanced stage of the discussion, the day may come when it will be more clearly seen and will more distinctly appear in the adjudication of the courts than as yet has been the case; that the proposition that what one man lawfully can do, what any number of men acting together by combined agreement may do, is to be received with newly disclosed qualifications arising out of the changed conditions of civilized life and of the increased facility and power of organized combination, and that the difference between the power of individuals, acting each according to his preference, and that of an organized extensive combination may be so great in its effect upon private and public interests as to cease to be simply one of degree and to reach the dignity of a difference in kind. . . . The right of competition rests upon the doctrine that the interests of the great public are best subserved by permitting the general and natural laws of business to have their full and free operation, and that this end is best attained when the trader is allowed in his business to make free use of these laws. . . . But from the very nature of the case it is manifest that the right of competition furnishes no justification for an act done by the use of means which in their nature are in violation of the principle upon which it rests.<sup>15</sup>

Here, then, we have a clear grasp of the modern situation and a clear recognition that changes in the conditions of civilized life call for equal changes in business methods and principles applicable to these changed conditions, that although it may be logically inferred that what one man may do singly he may also do jointly with others, results may prove this an invalid conclusion, and the difference in conditions may be so important as to make the inference impossible.

We may now draw the boundaries of monopoly and competition as well as state the principles for determining the reasonableness of the same. The legitimacy of a given business method, or use of property, or contract in restraint of trade is to be determined by reference to the public interest or good of society, from which all rights are derived. Monopoly or contracts in restraint of trade giving the parties concerned the power or possibility of controlling prices are against the public interest and are

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<sup>15</sup> 185 Mass. 255, 259-61.

void. Competition, when it is an action against an individual by a combination which aims to destroy his business by a mere agreement not to trade with him, or by going beyond the ordinary course of trade, such as doing business at a loss—is against the public interest and unlawful. Under the police power, the legislature may pass any laws limiting methods of business and uses of property to any extent which they deem necessary for the welfare of the people.

It would be quite impossible to enumerate all the particular acts declared illegal both by statutes and courts within the limits thus drawn. But the mentioning of a few may aid in getting a clearer idea of unfair competition. A manufacturer or seller may not give rebates to the purchasers of his commodities for the purpose of maintaining and fixing prices.<sup>16</sup> He may not sell goods lower at one place than at another for the purpose of destroying competition.<sup>17</sup> He may not compel dealers not to purchase or deal in the goods of a rival so as to have him deal in his own exclusively.<sup>18</sup> He may not follow the employees of a rival and harass them while engaged in the discharge of their duties. He may not publish false and injurious reports about his rival.<sup>19</sup> He may not fix the prices and conditions under which dealers should sell his goods.<sup>20</sup> A seller as a member of an association of retail dealers may not refuse to sell goods to a non-member, or charge him higher prices than a member,<sup>21</sup> nor compel wholesale dealers not to sell goods to non-members.<sup>22</sup> And, as a member of a monopoly, he may not charge more than competitive prices for his goods under penalty

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<sup>16</sup> *State v. Standard Oil Company*, 218 Mo. 1,442.

<sup>17</sup> 226 U. S. 157, *Central Lumber Co. v. So. Dakota*.

<sup>18</sup> *People v. Duke*, 44 N. Y. Supp. 336; *Commonwealth v. Strauss*, 191 Mass. 145. *Cilley v. United Shoe Machinery Co.*, 152 Fed. 726.

<sup>19</sup> *Standard Oil Co. v. Doyle*, 118 Ky. 622.

<sup>20</sup> *Cont'l Wall Paper Co. v. Voight & Sans*, 212 U. S. 227; *Dr. Miles Med. Co. v. Pork & Sans Co.*, 220 U. S. 873.

<sup>21</sup> *Montague & Co. v. Lowry*, 193 U. S. 38.

<sup>22</sup> *Cleland v. Anderson*, 66 Neb. 252.

of treble damages.<sup>23</sup> All such acts are forbidden as tending toward and establishing a monopoly. But any contract in restraint of trade, or method of business is permitted by the courts when it is not a part of a monopolistic scheme nor is likely to produce such a result.

When we consider that hardly one of these acts would be denied to an individual acting singly for his own interests, and compare them with acts prohibited and allowed by the common law as expounded by Lord Justice Bowen and Judge Jones, both of whom we have quoted, we begin to see what a remarkable change has taken place from the principles and methods of individual competitive bargaining to those of co-operative and monopolistic bargaining. The courts are beginning to recognize a difference in kind between acts of individuals acting alone and acts of individuals acting jointly. The query now arises what the conditions are that account for this difference. What is the difference between competition as carried on by an individual and as carried on by a combination?

Lord Justice Bowen said the Mogul Steamship case presented "an antinomy between two rights equally regarded by the law—the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of defendants to carry on their business as seems best to them, provided they commit no wrong to others." Did defendants commit any wrong to others? The judge answers by taking a *backward* look. He finds that in 1620 it was forbidden to drive servants and workmen away from a rival by threatening to cut their arms off; that in 1706 it was forbidden to fire with guns into a man's decoy pond for the sake of frightening away his fowl; that in 1804 it was forbidden to drive a rival's customers away by shooting them with cannon; that in 1810 it was declared illegal to drive actors off the stage by preconcerted hissing; and that in 1853 it was forbidden for a third

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<sup>23</sup> *Chattanooga Foundry Co. v. Atlanta*, 203 U. S. 390.

party to induce the breaking of personal contracts. "But the defendants," he says, "have been guilty of none of these acts. They have done nothing more against plaintiffs than to pursue to the bitter end the war of competition in the interest of their own trade." If they had had no such interest to maintain, and if they had injured plaintiff for the mere sake of the injury, it would have been unjust. But, since it was done for the sake of their own interests, it was just and lawful. Lord Esher, however, looks at the question from an opposite point of view. He takes a *forward* look and considers whether such competition is compatible with the public interest and welfare. He does not see that there is any permanent gain to the public in destroying a useful trader by doing business at a loss, as the defendants did, and therefore would give judgment for the plaintiff.

Thus the solution of the antinomy between equal rights turns upon the point of view of the judge. Does the act come within the scope of acts classified as wrong in the past? If not, it is right. Or does it tend to further or hinder the public good? if the former, it is right; if the latter, it is wrong. Which of these two views is based on the better ethical and logical principle?

The first essential in deciding this issue is a keen consciousness of the different logics used in these two lines of cases. It is significant that on both sides there are judges who say that the standard of reference is the public interest. The conservatives argue in syllogistic fashion as follows: Competition is the life of trade and in the interest of the public. This is a case of competition. Therefore it is the life of trade and in the interest of the public. This reminds one of Aristotle's logic, but it is not in agreement with his ethics in which he says that knowledge is virtue provided it is knowledge of the major and minor premises in their proper relationship. I think Aristotle was right. You must be sure of your major premise and then that your minor comes within the major before it is possible to draw a proper conclusion. The difficulty with the

conservative judges is that they do not examine their premises to see whether they are true or not. They naively assume that their major premise, "competition is the life of trade," is an eternal law of nature. They then merely determine whether the case at bar is a case of competition. If it is, it must be part of the eternal order and therefore privileged. They make no effort to distinguish between kinds of competition and assume with equal naiveté that to distinguish between fair and unfair competition passes the power of the courts and of the human understanding.

In contrast with such a naive syllogistic procedure is the logic underlying the opinion of the liberal judges. For want of better terms I shall call this the functional, genetic, evolutionary, or situational logic. For the sake of brevity I shall restrict myself to the term functional. According to this method in ethics we take the view that morals are group habits formed to meet the requirements of a particular situation and are right or function satisfactorily when they satisfy the needs of the group in that situation. If a conflict arises we should discover the condition out of which it arose, find out how the old system of morals originated, analyze the new situation in which it functioned, and find the elements which made the old system satisfactory, analyze the new elements in the changed situation which impair the usual functioning of the old morals, then project an hypothetical solution keeping the good of the old system as much as possible and making changes only for the new elements in the changed situation, and finally try out the proposed solution in a practical way.

In agreement with this method we have found that the competitive system grew out of ancient conditions of monopoly and was approved by the judges of the transition period because it better satisfied the interests of the public. It did this because it allowed free range to individual incentive and capacity; and success depended, among other things, on good management, prompt service,

considerate treatment of customers, ability to produce and sell goods of a quality and price demanded by the customers, and on capital, which, however, was only one element. With reference to the traders the system was a success because they were approximately equal in capital; and one could play "the rules of the game" as effectively as another. Under such conditions competition was the life of trade, that is, on the whole it was worth more to the public than it cost. When, however, a combination is introduced into these conditions then success depends principally upon the single element of capital against which the other elements of success in the small trader are of no avail. Competition, as between the combination and the individual trader, instead of being the life of trade, becomes the restraint of trade, the outcome of which is inimical to the interests of the public.

When, under these conditions, a judge tells us that what is right for an individual is also right for a combination, he is basing rights upon the single element of capital. He fails to see that this element in the combination destroys all the other values of the old competitive system. He assumes that a difference in magnitude does not produce a difference in kind, and he is led into this assumption because in law both the individual trader and the combination possess the common name of "person." When, however, the individual person and the corporate person are analyzed and the elements of success in each are made distinct, then such propositions fall to the ground. In general the judge who commits such fallacies fails to analyze the situation in which the morals in question function. He is satisfied to refer to cases which have nothing more in common than simply some problem of competition, and then argues that, if in the case at hand nothing was committed which was forbidden in the past, the act complained of is just and lawful. This sort of procedure is quite correct when the cases referred to and the act in question present identical situations. It is then a matter of prudence to apply to a present situation what

has proved successful in the past in an identical situation, and only when such a motive is present in the consciousness of a judge is this reference to past cases profitable. But to say that what is lawful for individuals is lawful for combinations is wholly to ignore their respective situations and to deal only with rules in the abstract. It assumes that an old competitive rule must *ipso facto* apply to a competitive situation, forgetting that one competitive situation may be wholly different from another. A judge using this method, instead of taking the pains to analyze the differences in situation which make a rule right in one case and wrong in another, is likely to devise new arguments in defense of an old rule, such as "the survival of the fittest," "the interests of the stronger," "the right to pursue trade for one's own interest." We may accept these arguments and assume that right lies with the stronger if we remember that both individuals and combinations are members within the state, which being the strongest of all may, on Judge Brannan's principle of "natural law," crush either individual or combination, provided it is for the state's "own interests." These would be "natural acts"; for if the acts by which combinations destroy competitors are "natural," the acts of the state which is the mother of the combination cannot be other than "natural."

It is not necessary to say more in criticism of the conservatives' opinions. They are based on fallacies, and of such fallacies monopolies are an expression. How they are such we have indicated above. I wish, however, to make clear the merits and reasonableness of the opinion of the liberal judges. They are conscious of the grounds upon which laws are based, and that this consciousness is a fundamental cause of their enlightened opinions is evident to anyone who reads them. An equally fundamental factor is that they study not only the concrete situation in which the laws in question function but also their concrete effects upon society. It is this which reveals to them that a difference in magnitude makes a

difference in kind and that a changed situation demands a new rule. This is not to be seen from *a priori* and syllogistic reasoning but is made evident by inductive reasoning from experience, from facts of observation. And by analogy, if birds must have a different sort of locomotion in the air than on the earth, and if fishes must breathe differently from horses, it is not unreasonable that large combinations should have a different method of carrying on business from a small trader. In all cases it is the changed situation that demands a new behavior. Morals are no exception to the functional character of biological behavior of which they are a part. To know this fact is more important in the administration of justice than to know law. What judges need is not so much a knowledge of law as a knowledge of philosophy, and by philosophy in this connection I mean a knowledge of the principles, logical and ethical, upon which morals are based, an awareness of the proper sort of methodology in practical reasoning.

Aside from the matter of methodology, the issue in the conflict of these cases is whether business is a matter of private interest and of private law or a matter of public interest and public law. The conservative judges take the former view, and the liberal judges the latter. The conservatives, therefore, do not see a difference in kind between the business of a private individual and that of a large combination. The liberals say that because business is affected with a public interest the combination cannot refuse service to anyone but must without discrimination serve all who apply, and further, that it cannot destroy competition by doing business at a loss. The difference in magnitude between a private individual and a corporation is important here. When a corporation becomes so large that its capital, business organization, and number of employees equals that of the government itself, and when it supplies an article of necessity to every community throughout the state's territory, it holds within its grip the fortunes of individuals quite as much



as the state itself and is equally affected with a public interest. To anyone alive to modern conditions there can be no doubt that business combinations should come within the public law and perform their duties with the same sense of obligation as the state, that is, give service to all impartially and without discrimination. Such a régime has, besides, the economic advantage of compelling both combination and individual to succeed on their merits; for it allows the individual to engage beside the combination provided he can produce just as cheaply and sell at the same margin of profit. If, however, the individual trader cannot succeed under these conditions, it is difficult to see how the public is benefitted by his retention. The state then might allow monopoly and supply the check of competition on prices by governmental regulation.

I cannot properly conclude this paper without raising the question of the meaning of public interest which is the ethical criterion used by the liberal judges and also referred to by one of the conservatives. That an adequate analysis of this concept is necessary is evident because different judges come to opposite conclusions in reasoning from the same standard. This must be the case so long as its meaning is left to individual opinion. An adequate discussion of a better method would carry us beyond the limits of this paper.

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